87-76

No. .....

In The

Supreme Court of the United States

October Term, 1986

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DAVID W. LEWIS,

Petitioner,

vs.

RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; LOYAL A. MEHRHOFF; DENNIS G. BUECHLER; JOHN WOLFLIN; RALPH PISAPIA; UNITED STATES OF AMERICA by and through the DEPARTMENT OF INTERIOR, U. S. FISH AND WILDLIFE SERVICE; and JOHN DOES I through X,

Respondents.

—o—

Appeal from the Ninth Circuit Court of Appeals

—o—

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a tenured federal employee bring a *Bivens* claim against his federal employer for denial of both property and liberty interests arising from the employee's refusal to comply with 43 C.F.R. 20.735, et seq, an elaborate regulatory system created by the United States Department of Interior, antecedent to and independent of the Civil Service Reform Act of 1978 (CSRA)?

2. Did the enactment of these regulations create a right to a pre-termination hearing, the denial of which may not be remedied by a post-termination hearing pursuant to the CSRA?

3. Is the CSRA the exclusive remedy for all matters arising out of the federal employer-employee relationship, including torts otherwise actionable pursuant to the Federal Tort Claims Act (FTCA), or as based upon the same facts and conduct, a constitutional tort claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David W. Lewis, hereinafter "Appellant," respectfully prays that this Court issue a Writ of Certiorari to review the Judgment and the Opinion of the United States Court of Appeals for the Ninth Circuit in *Lewis v. Myshak, et al,* No. 86-3574 (November 17, 1986).

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OPINIONS BELOW

A Memorandum Judgment of the Ninth Circuit Court of Appeals in *Lewis v. Myshak, et al,* is unreported and is attached to this Petition as Appendix A. An Order denying Appellant's Petition for Rehearing is unreported and is attached as Appendix B. An Amended Order Denying the Petition for Rehearing and Rejecting the Suggestion for Rehearing *en banc* is unreported and is attached as Appendix C. The Order of the Federal District Court is unreported and is attached as Appendix D.

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JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was filed on November 17, 1986. The Order Denying Appellant's Petition for Rehearing was filed February 20, 1987. The Amended Order Denying Appellant's Petition for Rehearing and Rejecting the Suggestion for Rehearing *en banc* was filed March 2, 1987. Jurisdiction to review the Judgment in this civil case by Writ of Certiorari is

conferred upon this Court by 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is filed within the time allowed by order of this Court dated May 26, 1987, which extended the time for filing this Petition to June 30, 1987.

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STATUTES AND REGULATIONS INVOLVED

1. Federal Tort Claims Act, 28 U.S.C. § 1346(d); 28 U.S.C. § 2680(a).

2. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

3. Department of Interior Regulations, 43 C.F.R. 20.-735-1, 2, 3, 4 and 6 (46 Fed. Reg. 58420-58429); 43 C.F.R. 20.735-40, 42, 43 (46 Fed. Reg. 58452-58454).

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STATEMENT OF THE CASE

At all times relevant to this case, David W. Lewis was employed by the Department of Interior, United States Fish and Wildlife Service as a wildlife biologist. On or about November 29, 1982, the Appellant was charged with conflict of interest violations by his employer. Pursuant thereto, his employment was officially terminated March 16, 1983. Appellant timely appealed this termination order by filing a grievance with the Merit System Protection Board (MSPB) on May 9, 1983. On January 31, 1984,

a decision was entered by the MSPB sustaining the charge of conflict of interest notwithstanding a specific finding that Appellant's supervisors had approved of his actions in advance. However, the penalty of termination was reversed to that of a thirty day suspension upon a finding that Respondents' failure to comply with 43 C.F.R. 20.735, et seq., was "harmful error". Appellant was reinstated to his former employment on or about February 13, 1984. However, the injury to his professional reputation and the mental depression caused by character assassination were not alleviated by reinstatement. By June 1, the Appellant had reached a level of complete mental depression warranting hospitalization. He was placed on indefinite sick leave for three months. He returned to work September 12 through October 21, 1984. He was admitted to the Veterans Hospital in Boise, Idaho on October 21, 1984, for treatment of traumatic depression and suicidal ideation. On July 30, 1985, the U.S. Department of Labor granted total worker's compensation benefits to Appellant due to an "employment related major effective disorder." The date of injury was found to be June 1, 1984.

Appellant sought damages for the unlawful taking of both his property interest arising out of the requirements of 43 C.F.R. 20.735, et seq., and his liberty interest in reputation arising out of the failure of the Respondents to comply with these regulations. A *Bivens*[1] constitutional tort claim and a Federal Tort Claims Act (FTCA) complaint were filed in the Federal District Court of Idaho.

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1 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971).

The constitutional tort claim was denied in reliance upon *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 767 L.Ed.2d 648 (1983). The FTCA cause of action was dismissed as untimely. The Ninth Circuit Court of Appeals affirmed, construing Appellant's constitutional tort claim to be a personnel issue subject to the Civil Service Reform Act of 1978 (CSRA). See Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.). Citing *Veit v. Heckler,* 746 F.2d 508, 511 (9th Cir. 1984), it held CSRA remedies to be exclusive. Appellant does not seek review of the decision denying the FTCA claim as untimely. Thus, the issue of an exception to the statute of limitations of the FTCA is not pursued.

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REASONS FOR GRANTING THE WRIT

The Ninth Circuit's determination that the personnel remedies afforded federal employees pursuant to the CSRA are meant to exclude damages for tort liability arising out of the federal employer-employee relationship has devastating implications for the abuse of that relationship and is without Congressional or judicial authority. As examined herein, the exclusion exemption to the FTCA found in 28 U.S.C. § 2680(a) does not preclude tort liability arising from the failure of the governmental employer to provide due process rights created by its own regulations. Such an action would not therefore be a personnel action contemplated by the CSRA. Similarly, a constitutional tort claim arising out of the same or similar facts would not be such a personnel action.

The constitutional claims of Appellant arise pursuant to certain substantive and procedural regulations adopted by the Department of Interior, effective December 1, 1981. 43 C.F.R. 20.735-1, 2, 3, 4 and 6 (46 Fed. Reg. 58420-58429); 43 C.F.R. 20.735-40, 42, 43 (46 Fed. Reg. 58452-58454). These regulations created a specific conflict of interest program applicable to all employees of the Department of Interior. 43 C.F.R. 20.735-2. As the Department of Interior's regulations affect the Appellant, identification of conduct which could create a conflict of interest was set forth in 43 C.F.R. 20.735-6. Permissible sanctions for having financial interests prohibited by law were set forth in 43 C.F.R. 20.735-4(b). The procedures for resolving conflicts or prohibited holdings were specified with particularity in 43 C.F.R. 20.735-40. Given a charge of conflict of interest, the regulation required an investigation by a neutral third party, i.e., the Ethics Counsellor, to evaluate the allegations. 43 C.F.R. 20.735-3. Given a determination that a conflict of interest in fact existed, the Ethics Counsellor, not the employer, must order remedial action. 43 C.F.R. 20.735-3(a)(2) and 20.735-40(d)(1). This authority could not be delegated to the individual agency employer. *Id.* Remedial action specifically included the opportunity for the affected employee to either divest himself/herself of any interest which might occasion the conflict of interest or establish a qualified trust. 43 C.F.R. 20.735-40(b)(2) and (3). An order for remedial action was a mandatory predicate to any disciplinary action taken by the employer. 43 C.F.R. 20.735-40(e). The regulations further created an appeal procedure by which the employee could challenge the proposed remedial order. 43 C.F.R. 20.735-43. The exercise of this appeal procedure

prior to initiation of any disciplinary action by the employer was also mandatory. *Id.* On October 27, 1983, the Department of Interior proposed an amendment to 43 C.F.R. 20.735-4(b)(1) which would waive this mandatory requirement and allow the employer to impose disciplinary action without compliance with the procedures for remedial action. 48 Fed. Reg. 49663, Sec. 3. On February 21, 1984, the proposed amendment to this rule was adopted with a modification which specifically included conflict of interest matters. 49 Fed. Reg. 6375, Sec. 5. However, at all times relevant to this action, this elaborate independent system with its mandatory requirements remained intact.

The Ninth Circuit panel chose to ignore the substantive rights created by these regulations. It ignored wrongful conduct which prevented the exercise of those substantive rights. Its decision and that of *Veit v. Heckler* are in conflict with *Carducci v. Regan*, 714 F.2d 171 (D.C. 1983). As authored by then Circuit Judge Scalia, the District of Columbia Court of Appeals first confirmed that a prior decision of that circuit "regarding the exclusivity of CSRA remedies did not extend to constitutional claims . . .". *Id.*, at p. 175. The Court reasoned that validity of the trial court's Rule 12(b)(6) dismissal of the constitutional claims before it required a determination as to whether the provisions of the CSRA were "intended to establish the exclusive elements of status and tenure to which civil service employees are entitled." It found the issue to be "one of first impression, and of major importance to all employees in the federal competitive service." The Court specifically declined to rule upon this last minute assertion of a due process claim. *Id.*, pp. 176-

177.[2] Similarly this same issue is highlighted but left unresolved in *Williams v. I.R.S.*, 745 F.2d 702, 704-705 (D.C. Cir. 1984). A clear conflict exists between the Ninth and District of Columbia Circuit Courts. In addition, the Ninth Circuit itself has limited the authority of *Veit v. Heckler* in *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), stating:

> Our conclusion that no review was available was confined to review of *Veit's* nonconstitutional claim. *Veit* also had a Fifth Amendment claim that we dealt with separately on the merits, holding that *Veit* had failed to show a property interest in a claimed merit increase. *Note N.6, 799 F.2d at p. 1350.*

The exclusivity of CSRA remedies was not established in *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed. 2d 648 (1983). The Court there held that the presence of a congressionally established, comprehensive regulatory scheme which governed federal employer-employee relations was a "special factor counselling hesitation" in implying a *Bivens* remedy. 46 U.S. at 378, 103 S.Ct. at 2411. No holding was made that the CSRA was the exclusive remedy for all wrongs arising out of the federal employer-employee relationship. *Fausto v. United States*, 791 F.2d 1554, 1558-59 (Fed. Cir. 1986). The point is underscored by Justice Marshall who in his concurring opinion stated:

> There is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens* remedy

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[2] The *Carducci* decision was entered August 12, 1983. The *Bush v. Lucas* decision was entered June 13, 1983. One may presume the *Carducci* Court was aware of the earlier Supreme Court decision when it found that the issue of exclusivity of CSRA remedies was yet to be determined.

> where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme. *Id., 103 S.Ct. at p. 2418.*

The federal statutory scheme referred to was the CSRA. Nothing in that decision could thus be held to prevent enforcement of employee rights derived from a regulatory system independent of and antecedent to the CSRA. *Fausto v. United States, supra.*

The Department of Interior's regulations as found in 43 C.F.R. 20.735, et seq., clearly established a substantive entitlement to remedial action in the case of conflict of interest. *Id.*, at 20.735-40(b)(1), (2) and (3). It clearly created an entitlement to procedural due process by establishing an appeal right to whatever remedial action was ordered by the Bureau Ethics Counsellor. 43 C.F.R. 20.735-43. Compliance with these procedures was a mandatory predicate prior to any disciplinary action the employer could take. 43 C.F.R. 20-735-40(e).

The refusal to take these remedial steps and to grant a hearing thereon is actionable as a negligent or wrongful act pursuant to the Federal Tort Claims Act (FTCA). See 28 U.S.C. § 1346(b). Cf. *Myers & Myers, Inc. v. United States Postal Service,* 527 F.2d 1252, 1260 (2nd Cir. 1975). The jurisdictional exception found in 28 U.S.C. § 2680(a) is inapplicable as the failure of the Respondents to adhere to their own regulations was not an action "in the execution" of the regulations. *Id.* It was a refusal to carry out a mandated governmental function, which in itself is a refusal to exercise due care, to show even a minimal concern for the rights of Appellant. Cf. *Hatahley v. United States,* 351 U.S. 173, 181, 76 S.Ct. 745, 752, 100 L.Ed. 1065 (1956); *Myers & Myers, Inc. supra.* Had such a refusal occurred within a state agency, these regulations would have im-

posed a duty analogous to a tort law duty as found under Idaho law. *Sterling v. Bloom,* 111 Idaho 211, 723 P.2d 755 (1986); *Jones v. City of St. Maries,* 111 Idaho 733, 727 P.2d 1161, 1165-74 (1986). (Huntley, J. concurring.) Pursuant to both federal and Idaho law, it would be a tort for the government to wrongfully refuse to perform a mandated regulatory function. *Id; Myers & Myers, Inc., supra.*

Appellant is not now petitioning for review of the Court of Appeals decision which barred the FTCA claim as untimely filed.[3] However, the fact that an FTCA cause of action could have been pursued is cause to challenge the "CSRA exclusivity of remedies" holding which denied Appellant's constitutional tort claims. The exclusion exemption for a FTCA claim based upon the mandated performance of a federal regulation does not preclude the claim if brought by a federal employee against his employer. 28 U.S.C. 2680(a). Had Congress intended to preclude such a tort action, it could have done so in its adoption of the exclusion. *Id.* This provision states:

> The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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[3] The failure to timely file the FTCA complaint occurred prior to substitution of present counsel for the Appellant.

Congress could have exempted a mandatory as well as discretionary function. That it did not is a proper basis to conclude that the scope of the exclusionary provision is to be literally construed. See *United States v. Johnson*, 1987—May 18, 55 U.S.L.W. 4647, 4652 (Scalia, J., dissenting).

The regulation as found in 43 C.F.R. 20.735-43, created a right to a pre-termination hearing. By denying this right, the panel's decision is also in conflict with *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982). Cf. *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In *Vanelli*, a public employee was given a presumptive entitlement to some form of notice and opportunity to be heard before being deprived of either property or liberty interest. *Supra*, at 778. Where only a presumption for due process was at issue, the *Vanelli* Court required an analysis as to whether the timing of the hearing should be pre or post-termination pursuant to a three part balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It found that a pre-termination right existed and allowed damages for the denial thereof even though a post-termination hearing was afforded. *Vanelli v. Reynolds School Dist. No. 7*, *supra*. The import of the *Vanelli* decision to the facts of this case is that notwithstanding the subsequent due process hearing before the MSPB in which the grounds of termination were upheld, the employee may be entitled to compensable damages for the denial of pre-termination property and liberty interests. *Id.*, 667 F.2d at 778-781; *Carey v. Piphus, supra*, 435 U.S. at 259-64.

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CONCLUSION

Pursuant to 43 C.F.R. 20.735, et seq., and for the specific purpose of remedying a conflict of interest, the Department of Interior chose to create an elaborate system, separate and distinct from that created by Congress pursuant to the CSRA. Appellant does not ask the judiciary to infer new rights or set aside a congressionally ordered scheme for resolving federal employment conflicts by fashioning a new remedy. Rather, the Court is called upon to allow Appellant to seek damages for the violation of a mandatory regulatory system created by the Executive Department which existed as a predicate to implementation of the Congressionally authorized scheme.

Central to Appellant's thesis is that the damages sought are the direct result of the employer's clear violation of 43 C.F.R. 20.735-40 and 43. Had these rules been complied with, Appellant could have divested himself of the interest or had a qualified trust established. See 43 C.F.R. 20.735-40(b)(2) and (3). There would have been no reason for disciplinary action and thus no forced utilization of the CSRA procedures. The MSPB's ultimate decision that a conflict of interest existed, notwithstanding a specific finding of prior approval for such interests, would not have been entered had the Respondents complied with the regulations. In the instant case, the Appellate Court held that Appellant's recourse was not a constitutional claim but rather an appeal from the MSPB decision pursuant to 5 U.S.C. § 7701(c)(2)(A). This determination assumes that Respondents' refusal to comply with 43 C.F.R. 20.735, et seq., is a personnel action which can be remedied under the provision of the CSRA. It is axio-

matic that the denial of constitutional rights, the observance of which would have obviated any utilization of the CSRA, cannot be cured by a subsequent hearing held pursuant to the CSRA. *Vanelli v. Reynolds School Dist. No. 7, supra; Carey v. Piphus, supra.*

This Court's holding in *Davis v. Scherer* has established that a state employer will not be shielded from liability for civil damages under *Bivens* if it can be shown that the violated regulations are themselves the basis upon which the injury and damages have occurred. 468 U.S. 183, 104 S.Ct. 3012, 3020, N.12, 82 L.Ed.2d 139, 149 N.12 (1984). Applying this same rationale to federal employment will not dilute the authority or scope of *Bush v. Lucas.* Clearly established rights would have to exist which could not be remedied under the CSRA. Those rights exist in this case by virtue of the establishment of 43 C.F.R. 20.735, et seq. Violation of those regulations has to be both of constitutional dimension and the precise basis upon which damages occurred. *Davis v. Scherer, Id.; Kotarski v. Cooper,* 799 F.2d 1342 (9th Cir. 1986). Each criteria is met in Appellant's case.

This Court should resolve the conflict between and with the circuit courts regarding the issue of exclusivity of remedies under the CSRA. It can do so and with careful precision, logically extend *Davis v. Scherer* to require compliance by the federal employer of its own substantive and procedural regulations.

RESPECTIVELY SUBMITTED this 29 day of June, 1987.

HYDE, WETHERELL, BRAY & HAFF

By CHRISTOPHER D. BRAY

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID W. LEWIS, Plaintiff-Appellant, vs. RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; LOYAL A. MEHROHOFF; JOHN WOLFLIN; RALPH PISAPIA; UNITED STATES OF AMERICA, by and through the Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE, Defendants-Appellees.	No. 86-3574 D.C. No. CV-84-1357-RM MEMORANDUM* (Filed November 17, 1986)

Appeal from the United States District Court
for the District of Idaho
Ray McNichols, Senior Judge, Presiding
Argued and Submitted November 10, 1986
San Francisco, California

BEFORE: KENNEDY and HALL, Circuit Judges, and SOLOMON,** Senior District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

David W. Lewis appeals from the district court's order dismissing his action against the appellee United States of America and several of its employees. All of the issues raised in this appeal are legal issues reviewable de novo by this court. *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). We affirm.

I

On April 20, 1983, appellant Lewis was removed from his position as a biologist for the Department of the Interior, Fish and Wildlife Service (FWS). Lewis appealed his termination to the Merit Systems Protection Board. The Board found that Lewis' position as a director and owner of a private hydroelectric enterprise constituted a conflict of interest with his job at the FWS. Since Lewis' supervisors at the FWS had not followed the Department of the Interior's regulations regarding the resolution of conflicts of interest, the Board held that the maximum allowable penalty was a thirty-day suspension. No suspension was ordered, and Lewis was reinstated to his position on February 13, 1984.

Lewis alleges that he was later forced to leave his job as a result of "severe emotional, physical and mental injuries." On June 18, 1984, Lewis filed an administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 *et seq.*, seeking $2.5 million in property damages for the destruction of the contractual relationship between himself and the United States Government and the destruction of his reputation in the community and $2.5 million in personal injury damages

for the intentional infliction of severe emotional distress. Lewis' claim was denied on November 27, 1984.

On July 12, 1984, Lewis filed this suit against his supervisors at the FWS in the Fourth Judicial District of the State of Idaho. He sought $5 million in damages for the intentional infliction of emotional and physical distress and the intentional interference with a contractual relationship. This suit was removed to the United States District Court for the District of Idaho. After removal, on August 26, 1985, Lewis filed a motion to amend his complaint to add, among other claims, a claim against the United States under the FTCA.

The district court ordered that the amended complaint be filed and simultaneously dismissed it. The court held that Lewis' claims against his supervisors were barred under the rationale of *Bush v. Lucas,* 462 U.S. 367 (1983), since Congress had provided an adequate civil service remedy. The court dismissed the FTCA claim against the United States as untimely.

II

In *Bush v. Lucas,* 462 U.S. 367 (1983), the Supreme Court rejected a *Bivens*[1] claim brought by a federal employee who sought to challenge his demotion on the ground that it was a reprisal for constitutionally protected activity. In dismissing the claim, the Court decided that it should not interfere with the "elaborate remedial system" designed by Congress by implying a *Bivens* remedy. 462

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[1] *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

U.S. at 388. Likewise, in *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984), this court held that "federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the [Civil Service Reform Act of 1978] or elsewhere."

In this case, Lewis had a remedy available under 5 U.S.C. § 7701(c)(2)(A) which provides that the Merit Systems Protection Board may not enforce an agency's decision if there was "harmful error in the application of the agency's procedures in arriving at such decision." The Board relied on this provision in refusing to uphold the FWS' decision to terminate Lewis. If Lewis was dissatisfied with the Board's decision finding that a conflict of interest existed and authorizing a thirty-day suspension,[2] his remedy was not to file this suit against his supervisors but rather to appeal the Board's decision to the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1). Therefore, the district court correctly dismissed Lewis' claims against his supervisors.

III

"A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). In this case, Lewis' administrative claim was denied by the Office of

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2 Although the Board authorized a thirty-day suspension, Lewis was reinstated without any suspension.

the Solicitor of the Department of the Interior on November 27, 1984. He waited until August 25, 1985 before making a motion to amend his complaint to add an FTCA claim against the United States.

Lewis argues that the failure of the United States to plead a statute of limitations defense in the October 17, 1984 answer to his original complaint constitutes a waiver of the defense. This argument fails for several reasons. First, the original complaint was not brought under the FTCA and did not name the United States as a defendant. The United States had no pleading burden at all when the answer was filed. Second, the administrative denial did not occur until November 27, 1984, over a month after the answer was filed. It would be nonsensical to require the United States to plead an affirmative defense in October 1984 when that defense did not actually arise until months later. Finally, the six month filing requirement of section 2401(b) is jurisdictional in nature. *Cf. Bailey v. United States*, 642 F.2d 344, 346 (9th Cir. 1981). The failure to plead the requirement as an affirmative defense is irrelevant.[3] The district court properly dismissed Lewis' FTCA claim against the United States as untimely.

AFFIRMED.

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[3] The district court correctly refused to extend the rationale of *Kelley v. United States*, 568 F.2d 259 (2d Cir.), *cert. denied*, 439 U.S. 830 (1978), to the facts of this case. *Kelley* involved a plaintiff who was unaware that the United States was the individual defendant's employer. Lewis makes no such claim in this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID W. LEWIS,	)	
	)	
Plaintiff-Appellant,	)	No. 86-3574
	)	
vs.	)	
	)	D.C. No.
RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; LOYAL A. MEHROHOFF; JOHN WOLFLIN; RALPH PISAPIA; UNITED STATES OF AMERICA, by and through the Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE,	)	CV-84-1357-RM
	)	
	)	
	)	ORDER
	)	
	)	(Filed
	)	February 20, 1987)
	)	
	)	
Defendants-Appellees.	)	

BEFORE: KENNEDY and HALL, Circuit Judges, and SOLOMON,* Senior District Judge

The panel has voted to deny the petition for rehearing. Judges Kennedy and Hall reject the suggestion for rehearing en banc and Judge Solomon so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Christopher D. Bray, Esq.
HYDE, WETHERELL, BRAY & HAFF
1004 West Fort Street
Boise, ID 83701

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID W. LEWIS,	)	No. 86-3574
	)	
Plaintiff-Appellant,	)	DC#
	)	CV-84-1357-RM
vs.	)	
	)	AMENDED
RICHARD MYSHAK, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	(Filed March
	)	2, 1987)

Before: KENNEDY and HALL, Circuit Judges, and SOLOMON*, Senior District Judge.

The panel has voted to deny the petition for rehearing. Judges Kennedy and Hall reject the suggestion for rehearing *en banc* and Judge Solomon so recommends.

The full court has been advised of the suggestion for rehearing *en banc* and no active judge has requested a vote on whether to rehear the matter *en banc*. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation, concurred in the denial of rehearing *en banc* before his death on February 14, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DAVID W. LEWIS, Plaintiff,	)	
vs.	)	Civil No. 84-1357
RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; JIM SISSON; LOYAL A. MEHRHOFF; DENNIS G. BUECHLER; JOHN WOLFLIN; and JOHN DOES I through X, Defendants.	)	MEMORANDUM OPINION AND ORDER (Filed December 20, 1985)

The matter is before this Court on the motion of the defendants to dismiss or in the alternative for summary judgment and on the motion of the plaintiffs to amend their Complaint. After briefing and oral argument, for the reasons set forth below, it is the decision of this Court that the defendants' motion to dismiss should be granted as to the amended Complaint.

Plaintiff, a federal employee, has made the allegations contained in this complaint in other proceedings. I find that the actions complained of were within the scope of the alleged wrongful removal or were otherwise "personnel actions" within the existing civil service statutory scheme. 5 U.S.C. § 2302(a). Congress has provided an elaborate and comprehensive scheme by which improper action taken against federal civil serivce employees may

be redressed. *Bush v. Lucas,* 462 U.S. 367, 385 (1983). Plaintiff has elected to pursue some of the remedies available to him and he has not elected to pursue others. He has filed administrative grievances, Merit System Protection Board appeals, and an administrative claim under the Federal Tort Claims Act. These allegations are made again in this complaint, which was initially filed in state court and later removed to this court by the United States. Under *Bush v. Lucas,* 462 U.S. 367 (1983) I find that the comprehensive regulation of federal civilian employment by Congress is a proper basis upon which to refuse to allow plaintiff to maintain a *Bivens* type action. *Bivens v. Six Unknown Fedl. Narcotics Agents,* 403 U.S. 388 (1971). Constitutional challenges by federal employees "are fully cognizable within this system." *Bush, supra* at 386. Even assuming that the federal defendants grossly overreacted to plaintiff's conflict of interest and were overzealous in taking personnel actions against plaintiff, this does not alter my conclusions that this plaintiff did have remedies available to him, and that it is for Congress, not this Court, to fashion the remedy.

Plaintiff also responds to the defendants' motion to dismiss by stating that he seeks to add the United States as a party defendant pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.* Plaintiff's administrative claim under the Federal Tort Claims Act was filed and denied administratively by the agency on November 27, 1984. Under 28 U.S.C. § 2401(b) a claimant has six months from the date of mailing of a determination denying a claim in which to file an action in an appropriate U.S. District Court. Plaintiff Dave Lewis did not do this despite being advised in the administrative tort claim determina-

tion of his right to file suit. Plaintiff did not file suit against the United States within the six months. He did file an action on August 29, 1984 in an Idaho state court which the U.S. removed to this court on October 18, 1984. Plaintiff Lewis now argues that he should be allowed to toll the six month requirement in 28 U.S.C. § 2401(b) under *Kelley v. United States,* 568 F.2d 259 (2nd Cir. 1978). I find *Kelley* to apply only to federal driver cases. *Willis v. United States,* 719 F.2d 608, 613 (2nd Cir. 1983). Furthermore, Kelley involved a plaintiff who was unaware that the United States is the individual defendant's employer. Here, Lewis was a fellow employee of the named defendants. I find no reason to extend the holding in *Kelley* to include Dave Lewis.

ORDER

Therefore, for the reasons set forth above,

IT IS HEREBY ORDERED THAT the Amended Complaint be filed, and IT IS FURTHER ORDERED THAT the Complaint on file herein be and the same hereby is dismissed with prejudice.

DATED THIS — day of ————, 1985.

/s/ RAY McNICHOLS
RAY McNICHOLS
Senior District Judge

Christopher D. Bray
HYDE, WETHERELL, BRAY & HAFF
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P. O. Box 139
Boise, Idaho, 83701
Telephone: 343-1855

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DAVID W. LEWIS, Plaintiff, v. RICHARD MYSHAK, WILLIAM H. MEYER, JOSEPH R. BLUM, RUSSELL E. MILLER, LOYAL A. MEHRHOFF, DENNIS G. BUECHLER, JOHN WOLFLIN, RALPH PISAPIA, JOHN DOES I THROUGH X, DEPARTMENT OF INTERIOR, U.S. FISH AND WILDLIFE SERVICE, Defendants.	)	Case No. CIV 84-1357 AMENDED COMPLAINT DEMAND FOR JURY TRIAL

COMES NOW, the above named plaintiff, and for cause of action against the several defendants, complains and alleges as follows:

PARTIES

I

1. The plaintiff, DAVID W. LEWIS, was at all times relevant hereto employed by the Department of Interior,

U.S. Fish and Wildlife Service, hereinafter "Service," as a biologist. He is a resident of Ada County, Idaho.

2. The defendant, Richard Myshak, was at all times relevant hereto employed by the Service as Regional Director. He resides in or near Portland, Oregon.

3. The defendant, William H. Meyer, was at all times relevant hereto employed by the Service as Deputy Regional Director. He resides in or near Portland, Oregon.

4. The defendant, Joseph R. Blum, was at all times relevant hereto employed by the Service, first as Assistant Regional Director and subsequently as Deputy Regional Director, succeeding Mr. Meyer. He resides in or near Portland, Oregon.

5. The defendant, Russell E. Miller, was at all times relevant hereto employed by the Service as Chief Personnel Officer, Region I. He resides in or near Portland, Oregon.

6. The defendant, Loyal A. Mehrhoff, is now retired from the Service, but at all times relevant hereto was Area Manager in Boise, Idaho. He is a resident of Boise, Ada County, Idaho.

7. The defendant, Dennis G. Buechler, was for the principal period relevant hereto employed by the Service as Boise Field Supervisor of Boise Ecological Services Office. He presently resides in or near Washington, D.C.

8. The defendant, John Wolflin, was at all times relevant hereto employed by the Service and is now the Boise Field Supervisor of Boise Ecological Services Office, succeeding Mr. Buechler. He resides in Ada County, Idaho.

9. The defendant, Ralph Pisapia, was at all times relevant hereto employed by the Service as Field Supervisor of the Laguna Niguel, California-Ecological Services Office. His present residence is Albuquerque, New Mexico.

10. The defendant, Department of Interior, United States Fish and Wildlife Service, is an agency of the United States Government, and at all times relevant hereto, the individual defendants were employees of the said Service.

11. The defendants, John Does I through X, are persons who are yet unknown to the plaintiff but reservation is hereby made for the addition of parties defendant and additional causes of action as determined by further discovery.

II

FIRST CAUSE OF ACTION

1. This action is brought to redress the deprivation of plaintiff's constitutionally protected liberty or property interest in reputation.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Dennis G. Buechler, hereinafter "Buechler," has over a period of some four (4) years, intentionally, with callous and reckless disregard and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner

which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but are not limited to:

(a) In the Summer of 1980, Buechler stated to Sherrie Rasmussen, then Administrative Officer for the Service, Boise Ecological Services Office, that if he ever became Field Supervisor of Ecological Services in Boise, the first action he would take would be to get rid of the plaintiff. The statement was made clearly, unequivocably, and with forceful determination.

(b) In February, 1981, Buechler was transferred to Boise, Idaho and promoted to Field Supervisor of the Ecological Services Office.

(c) On or about September 4, 1981, Buechler obtained plaintiff's signature on a proposed performance evaluation at a Level 2 and then thereafter changed the performance evaluation to a Level 3. The evaluation as then constituted was given to defendant, Mehrhoff. Plaintiff subsequently discovered the falsification and challenged the same to Mehrhoff who was Buechler's immediate supervisor. Though the improper change of performance level was established, plaintiff was stigmatized as a troublemaker and his altered status to the Level 3 performance rating maintained.

(d) In March of 1982, the plaintiff informed Buechler that he was part of a company known as Intermountain Power Company and had the responsibility of writing certain documents for the company on potential hydroelectric sites, i.e. Exhibit "E's" to Federal Energy Regulatory Commission (FERC) applications. Plaintiff at that time

asked Buechler whether the same might constitute a conflict of interest with regard to the plaintiff's duties for the Service. As Field Supervisor, Buechler indicated that he saw no conflict as long as the plaintiff did not review any such document in his official capacity which he had prepared on behalf of this company, and that he not write them on government time. Buechler then said he would clear plaintiff's situation with defendant, Mehrhoff. A few days later, Buechler informed the plaintiff that Mehrhoff had given his consent. The issue was again discussed between plaintiff and Buechler on May 28, 1982, at Annabelle's Restaurant in Boise, Idaho. In response to these discussions, Buechler assigned Signe Sather-Blair to review and comment on the early consultation letters on small hydroelectric power projects including those submitted by Intermountain Power Company. Heretofore, these responsibilities had belonged to the plaintiff. Further, Buechler was asked by plaintiff and did consent to relieve plaintiff of the duty of reviewing the FERC applications and be taken off the lead FERC coordinator function. Each of these requests by plaintiff was made for the express purpose of seeking to avoid a conflict of interest situation.

(e) Buechler was thus aware that plaintiff was writing Exhibit "E's" for Intermountain Power Company and he gave plaintiff permission to engage in this activity.

(f) In October, 1982, a competitor of Intermountain Power Company lodged a verbal complaint with the Service, Boise Office, alleging conflict of interest on behalf of the plaintiff and co-worker George Harrington. Further, the said competitor threatened the Service with a lawsuit.

(g) In response, and on or about October 25, 1982, Buechler telephoned George Harrington while the latter was on vacation in Kamiah, Idaho expressing his rage and hatred of the plaintiff. He stated he would kill Lewis given the opportunity. Harrington, in turn, telephoned the plaintiff that same evening and advised him of Buechler's threats. He repeated and confirmed his desire to kill or otherwise physically harm the plaintiff to Harrington in early November while the two were traveling to Pocatello and Idaho Falls.

(h) In further response, and during the approximate period October 25, through November 10, 1982, Buechler, by telephone conversations and personal meetings with Area Supervisors for the Idaho Fish and Game Department and other Supervisors in Federal Agencies which have working relationships with the Service's Boise Office, did declare and disseminate "conflict of interest charges" against the plaintiff.

(i) As a consequence of Buechler's actions, employees of the Idaho Fish and Game and other agencies refused to and/or did question whether they would be willing to continue working with the plaintiff in his employment duties for the Service.

(j) Buechler could have, but chose not to provide assistance to plaintiff to resolve the conflict of interest problem. He knew or should have known of the requirements of 43 C.F.R. 20.735-40 et seq. (Subpart E-Resolution of Conflicts of Interest). He refused to take the necessary actions to comply with this regulation. The regulation requires the Service to attempt remedial action before any adverse personnel action may be taken.

(k) Buechler further participated in the preparation for discharge and subsequent Merit System Protection Board appeal hearing as a hostile witness against the plaintiff, knowing that he had given plaintiff permission to engage in the very activity for which he was now seeking to terminate plaintiff's employment and governmental career.

(l) Buechler's actions against plaintiff have had a corrosive effect against the plaintiff's reputation and status as a governmental employee beyond the Boise area. As an example thereof, on or about April 21, 1983, Felix Smith, former Supervisor of the plaintiff in Sacramento, California spoke by telephone to Jack Donahue, Regional Office in Portland, regarding the fact that Bureau of Reclamation employees were aware of the termination effort against the plaintiff. Further, it was obvious that the Service was "still giving Lewis the shaft."

(m) As a result of Buechler's actions and failure to seek compliance with 43 C.F.R. 20.735-40, et seq., defendant, Blum, issued plaintiff's proposed termination order on March 16, 1983, which was subsequently affirmed by defendants, Meyer and Myshak. The charges were conflict of interest and theft of a government travel voucher.

(n) An appeal by plaintiff was timely filed and a Merit System Protection Board hearing was held on August 16-18, 1983. A "Decision" was entered January 31, 1984. The said Decision found that either a substantial conflict of interest existed or the appearance thereof. As an affirmative defense thereto, the Decision held that the plaintiff could reasonably have assumed that his superior, Buechler, and Mehrhoff and approved the actions giving rise to the allegations of conflict of interest. Further, the

second cause for discharge, theft of a government travel voucher, was dismissed for lack of a prima facie case.

(o) The Service maintains a personnel file regarding all "adverse actions" involving the plaintiff. That file is accessible by other Service employees who are engaged in hiring or employee promotions. Under some circumstances, the file is partially accessible to private employees. That file evidences the full effort and the results of the discharge effort against the plaintiff and the consequent MSPB appeal hearing and orders. No such record would have been created had the named defendants, each one of them, complied with 43 C.F.R. 20.735-40 et seq.

(p) As a proximate cause of Buechler's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40, et seq., the plaintiff has suffered severe emotional and physical distress through the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(q) As a proximate cause of Buechler's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20. 735-40, et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(r) As a proximate cause of Buechler's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20. 735-40, et seq., the plaintiff has suffered a stigma regard-

ing his professional reputation and credibility beyond the date of the Merit System Protection Board Order.

(s) As a proximate cause of Buechler's actions, plaintiff's ability to return to the Boise ES Office free of management interference is absent. Further, plaintiff's ability to secure governmental or private sector employment in his profession is absent.

III

SECOND CAUSE OF ACTION

1. Plaintiff realleges the allegations as found in his First Cause of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Loyal A. Mehrhoff, hereinafter "Mehrhoff," has intentionally, with callous and reckless disregard and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) On November 1, 1982, the defendant, Mehrhoff, and Mr. James Teeter, Regional Officer from Portland, met for lunch. Mr. Teeter had been assigned to perform a fact finding mission on the allegations on conflict of interest. At that meeting, Mehrhoff stated to Teeter and the plaintiff that it did not appear that any conflict of

interest existed in this case. Teeter agreed. Further, Teeter stated that it appeared to him that there was an entrapment effort by Buechler against Lewis. Teeter's report was completed within one week. Therein he made a recommendation, thereafter known by all named defendants, that a Department of Interior ethics counselor review the conflict of interest issues here present.

(b) Notwithstanding Mehrhoff's knowledge that no conflict of interest existed and his approval to plaintiff of actions regarding Intermountain Power Company, Mehrhoff met with defendant, Blum, in Reno, Nevada during the third week of November to fianlize the official reasons for a 120 day temporary detail order which would remove plaintiff, Lewis, from Boise to the Laguna Niguel, California. The actual reasons for that order include but are not limited to a punitive measure against plaintiff for the alleged conflict of interest.

(c) During the month of October and culminating on November 23, 1982, plaintiff specifically advised Mehrhoff that Buechler had been and was now making threats of physical harm towards the plaintiff. Further, and on November 15, 1982, that plaintiff was then applying for a weapons permit and was then keeping a weapon to protect himself from Beuchler. Further, that Buechler was using both marijuana and cocaine during this period of stress and was in fact capable of performing irrational behavior against not only the plaintiff but others including Mehrhoff.

(d) On November 23, 1982, the plaintiff told Mehrhoff that he had better talk to Blum and get Buechler out of there before Buechler shot somebody. Mehrhoff stated,

"He (Mehrhoff) didn't want that son-of-a-bitch Buechler chasing him down the hall with a pistol." Further, Mehrhoff indicated he would get Blum to act on it immediately. On November 29, 1982, Blum cut orders detailing the plaintiff to Laguna Niguel, California, George Harrington to Portland, Oregon, and Buechler to Washington, D.C. Plaintiff's reassignment order required relocation by December 5, 1982.

(e) Plaintiff returned to Boise on temporary assignment on or about December 16, 1982, through January 4, 1983. On December 21, 1982, the plaintiff received a weapons permit allowing him to maintain a concealed weapon in his automobile. A copy of the permit was immediately given to Mehrhoff who stated he would forward it to Blum.

(f) On December 28, 1982, the plaintiff was granted a permit allowing him to carry a weapon on his person. A copy of the same was given to Mehrhoff who stated he would forward it to Blum.

(g) Mehrhoff, acting in concert, directly or indirectly, with defendants, Myshak, Meyer, Blum and Miller, had the plaintiff's employment status in the Boise Field Office of the Service altered by an immediate detail to Laguna Niguel, California. The plaintiff's reputation for honesty and integrity in the said Field Office was severely impaired thereby. These efforts were done for the purpose of shielding the inadequacies of the Field Supervisor, defendant, Buechler, and those responsible to supervise him, at the expense of the reputation and employment status of the plaintiff.

(h) During the period May, 1982, through November, 1982, Mehrhoff could have, but chose not to provide assis-

tance to plaintiff to resolve the conflict of interest problem. He knew or should have known of the requirements of 43 C.F.R. 20.735-40 et seq. (Subpart E-Resolution of Conflicts of Interest). He refused to take the necessary actions to comply with this regulation.

(i) Mehrhoff further participated in the preparation for discharge and subsequent Merit System Protection Board appeal hearing as a hostile witness against the plaintiff in awareness of the facts stated above. After hearing Mehrhoff's testimony, the Hearing Officer made an express finding that Mehrhoff's testimony was not believable, i.e. "incredible." See defendants' Motion to Dismiss, Exhibit "A," pp. 16-18.

(j) Mehrhoff's actions against plaintiff have had a corrosive effect against the plaintiff's reputation and status as a governmental employee beyond the Boise area. As an example thereof, on or about April 21, 1983, Felix Smith, former Supervisor of the plaintiff in Sacramento, California, spoke by telephone to Jack Donahue, Regional Office in Portland, regarding the fact that Bureau of Reclamation employees were aware of the termination effort against the plaintiff. Further, it was obvious that the Service was "still giving Lewis the shaft."

(k) As a result of Mehrhoff's actions and failure to seek compliance with 43 C.F.R. 20.735-40 et seq., defendant, Blum, issued plaintiff's proposed termination order on March 16, 1983, which was subsequently affirmed by defendants, Meyer and Myshak.

(l) As a proximate cause of Mehrhoff's actions, including but not limited to the failure to seek resolution of

any alleged conflict of interest pursuant to 43 C.F.R. 20. 735-40 et seq., the plaintiff has suffered severe emotional and physical distress through the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(m) As a proximate cause of Mehrhoff's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20. 735-40 et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(n) As a proximate cause of Mehrhoff's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20. 735-40, et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility beyond the date of the Merit System Protection Board Order.

(o) As a proximate cause of Mehrhoff's actions, plaintiff's ability to return to the Boise ES Office free of management interference is absent. Further, plaintiff's ability to secure employment within government or the private sector in his profession is absent.

IV

THIRD CAUSE OF ACTION

1. Plaintiff realleges each and every allegation contained in his First and Second Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Joseph R. Blum, hereinafter "Blum," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) On October 4 and 5, 1982, defendant, Blum, attended a national conference in Harpers Ferry, West Virginia. There he engaged in a conversation with Mr. Norman Chupp, former Deputy Chief of the Division of Ecological Services for the Service. Mr. Chupp was a former Field Supervisor of the plaintiff for the period approximately 1971 through 1972. In the said conversation, defendant, Blum, asked Mr. Chupp his opinion regarding the supervisory skills of defendant, Buechler, and his opinion regarding the character of the plaintiff. He was told that the plaintiff was intelligent, hard working but different, i.e. that he would not respond well to a "heavy-handed" supervisor who could not earn his respect. Further, that it was doubtful that defendant, Buechler, had the necessary skills to earn the respect of his employees. See March 21, 1983 letter from Chupp attached.

(b) On November 29, 1982, Blum officially issued, at separate times, the "not to exceed" 120 day reassignment orders to the plaintiff, George Harrington and Buechler.

In a staff meeting the same date, Blum stated that the conflict of interest charge was independent of his reassignment directives, i.e. a Service need existed for the plaintiff with his professional background and talent at the Laguna Niguel, California site, and that a personality conflict existed between the Field Supervisor Buechler and Lewis. It was general knowledge that a personality conflict would be resolved by removing one but not both of the parties to any such conflict.

(c) Blum knew or should have known that plaintiff's qualifications are in big game management. Blum knew or should have known that the work being performed in Laguna Niguel, California by the Service was in coastal life management zones, marine biology, intertitle-saline environment, plant/animal identification, fisheries, etc. Blum knew that the plaintiff did not possess the background, educationally or professionally, or the necessary training to work on projects at the Laguna Niguel office.

(d) Blum knew or should have known that the removal of Field Supervisor Buechler to Washington, D.C. would eliminate the personal conflict between the said Field Office Supervisor and the plaintiff. Thus, Blum knew that the reasons he stated for detailing the plaintiff to Laguna Niguel were false.

(e) Blum, directly or indirectly, instructed Ralph Pisapia, Field Supervisor for the Laguna Niguel office, to isolate the plaintiff from meaningful contact with his coworkers. Blum, directly or indirectly, instructed the said Ralph Pisapia to remove from the plaintiff the normal elements of employment for an employee of plaintiff's station, including but not limited to absence of a key to the

office, absence of a telephone, refusal to allow plaintiff an on-site inspection of his work project for 89 days, and to scrutinize any expense reimbursement request made by plaintiff with the intent to delay and obstruct the same.

(f) Ralph Pisapia carried out these directives of Blum. Blum knew or should have known that such directives would impair the plaintiff's ability to function as a normal employee and stigmatize him before all of his other co-workers in Laguna Niguel.

(g) Blum, directly or indirectly, informed F. Eugene Hester, Deputy Director of the Department of Interior, U.S. Fish and Wildlife Service, that the reason plaintiff was detailed to Laguna Niguel was because of a conflict of interest in matters dealing with his employment in the Boise Office. This reason was asserted as the cause for the reassignment to United States Senator DiConcini by F. Eugene Hester, Department of Interior, Deputy Director of U.S. Fish and Wildlife Service.

(h) On March 8, 1983, and with knowledge that the Office of Inspector General had just completed its investigation regarding the allegations of conflict of interest against the plaintiff, Blum telephoned the plaintiff in Laguna Niguel. He orally advised and telefaxed an order rescinding the temporary duty assignment because the said investigation was now complete. Further, he instructed the plaintiff to immediately return to Boise.

(i) On March 10, 1983, Blum issued a formal return travel order for the plaintiff to cease work at the end of the business day, March 14, 1983, and return to Boise on March 15, 1983, for the start of business. Such an order

in fact required the plaintiff to drive a 14 hour, 1,100 mile trip.

(j) In the same March 8, 1983 telephone call, the plaintiff objected to Blum's directive. By letter dated March 9, 1983, Lewis issued a written response outlining these objections citing safety rules and regulations as to why compliance with the request was impossible.

(k) On March 11, 1983, Blum's original directive was countermanded by written order of James Teeter, Assistant Regional Director-Environment, and a three-day return schedule was authorized, i.e. return by March 17, 1983.

(l) Prior to the defendant, Blum's, March 16, 1983, proposed termination of plaintiff, all of the named defendants directly or indirectly were advised that any termination of plaintiff as planned would contravene the Department of Interior's own personnel regulations, and defendants were cautioned not to go forward with plaintiff's termination as planned. Despite these warnings, defendants intentionally, wrongfully and maliciously terminated plaintiff on April 20, 1983.

(m) On March 17, 1983, the plaintiff returned to Boise, Idaho at 3:00 o'clock p.m. He was met by Field Supervisor John Wolflin who handed him the proposed dismissal action signed by Blum and dated March 16, 1983.

(n) At all times relevant herein, Blum knew or should have known the requirements of 43 C.F.R. 20.735-40 et seq. (Subpart E-Resolution of Conflicts of Interest). Blum refused to implement and follow those regulations.

(o) Blum, acting in concert, directly or indirectly, with defendants, Myshak, Meyer, Miller and Wolflin, com-

mitted himself to the termination of plaintiff's employment status with the Service and the destruction of his reputation for honesty and integrity by refusing to follow the said regulations.

(p) The effect of Blum's actions against the plaintiff in the Boise area as well as the Laguna Niguel area had a corrosive effect against the plaintiff's reputation and status as a governmental employee.

(q) As a proximate cause of Blum's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered severe emotional and physical distress through and beyond the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(r) As a proximate cause of Blum's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through and beyond the date of the said Merit System Protection Board Order. Such a stigma was not eliminated by said Order. Plaintiff's ability to secure upward mobility in the Boise Office or elsewhere with government service is forever impaired given his status as a government employee who successfully challenged management's discharge effort.

V

FOURTH CAUSE OF ACTION

1. Plaintiff realleges the allegations as found in his First, Second and Third Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Richard Myshak, hereinafter "Myshak," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities The overt acts committed by the defendant include but were not limited to:

(a) As Regional Director at all times relevant hereto, Myshak knew or should have known of all of the actions taken by the defendants, Myer, Blum, Miller and Mehrhoff, in response to the allegations of conflict of interest against the plaintiff.

(b) As Regional Director, Myshak either approved or failed to reject the said actions.

(c) Myshak knew or should have known of the requirements of 43 C.F.R. 20.735-40 et seq. He refused to implement or require the implementation of the said regulations.

(d) No other dismissal for conflict of interest has ever been attempted during the tenure of Myshak as Regional Director.

(e) Myshak specifically approved the decision to relocate plaintiff to Laguna Niguel, California and terminate the plaintiff.

(f) Myshak's actions were taken in awareness that plaintiff had lodged a complaint with the Office of the Inspector General against Myshak and others for the improper use of government funds to two retirement parties; one on January 20, 1983, in Sacramento, California for William Sweeney, and the other in Boise, Idaho for defendant, Mehrhoff. Specifically, on January 27, 1983, Myshak authorized and participated in the use of a government aircraft, and the appoval of travel vouchers for six persons from the Portland Office to attend a retirement party in Boise for defendant, Mehrhoff. Ultimately, and on or about September 28, 1983, in fact, a letter of admonishment was issued against Myshak by the Service for his involvement and authorization of the said travel to both retirement parties.

(g) As a proximate cause of Myshak's actions including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered severe emotional and physical distress through and beyond the date of the Merit System Protection Board Order when he was reinstated with full back pay.

(h) As a proximate cause of Myshak's actions including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through the date of the said Merit System Protection Board Order. Such a stigma was not eliminated by the said Order. Plaintiff's ability to secure upward mobility in the Boise Office or elsewhere with government service forever impaired given

his status as one who successfully challenged an improper management decision.

VI

FIFTH CAUSE OF ACTION

1. Plaintiff realleges the allegations of fact as found in his First, Second, Third and Fourth Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, William H. Meyer, hereinafter "Meyer," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) In late October, 1982, Meyer advised, concurred and approved the course of conduct against the plaintiff by defendants, Beuchler, Mehrhoff and Blum, prior to the issuance of written charges against the said parties.

(b) On April 1, 1983, Meyer and defendant, Russell E. Miller, met with the plaintiff in Meyer's office in Portland, Oregon as a prelude to the discharge of the plaintiff.

(c) As of April 1, 1983, and no later than April 13, 1983, Meyer specifically reviewed the Service regulations regarding conflict of interest.

(d) On April 13, 1983, Meyer issued a written decision terminating plaintiff as an employee of the Service.

(e) Meyer knew or should have known of the existence of 43 C.F.R. 20.735-40 et seq., and its specific requirements.

(f) Meyer could have but chose not to provide remedial assistance to the plaintiff to resolve the conflict of interest problem. He refused to take the necessary actions to comply with the stated regulation.

(g) As of April 13, 1983, Meyer had some 18 or 19 years of employment with the Service. During that time of employment and as of April 13, 1983, Meyer was unaware of any person in the Service who had been terminated based upon conflict of interest violations.

(h) Prior to entering his termination decision on April 13, 1983, Meyer specifically informed members of the Idaho Fish and Game Department that the plaintiff was in a conflict of interest situation. In response, those state officials accepted Meyer's conclusion as fact and raised questions of credibility between the two agencies. Meyer then terminated the plaintiff to resolve an interagency credibility problem he helped create.

(i) As a proximate cause of Meyer's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40, et seq., the plaintiff has suffered severe emotional and physical distress through and beyond the date of the said Merit System Protection Board Order.

(j) As a proximate cause of Meyer's actions, including but not limited to the failure to seek resolution

of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40, et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through and beyond the date of the said Merit System Protection Board Order.

(k) As a proximate cause of Meyer's actions, plaintiff's ability to return to the Boise ES Office free of management interference is absent. Further, plaintiff's ability to secure or maintain employment within government or the private sector in his profession is absent.

VII

SIXTH CAUSE OF ACTION

1. Plaintiff realleges the allegations of fact as found in his First, Second, Third, Fourth and Fifth Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.E.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Russell E. Miller, hereinafter "Miller," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) Miller was Chief of Personnel Operations for the Service, Region I, Portland, Oregon for the period at least October, 1982, through April, 1983.

(b) As of the last of October, 1982, Miller counseled defendant, Blum, with regard to the proper procedures to take against the plaintiff.

(c) Miller further assisted Blum in preparing the initial letter of termination against the plaintiff in March, 1983.

(d) From mid-March through April 13, 1983, Miller advised and assisted defendant, Meyer, with regard to Meyer's decision to terminate the plaintiff.

(e) Miller knew or should have known of the existence and requirements of 40 C.F.R. 20.735-40 et seq.

(f) Miller refused or otherwise failed to insist that defendants, Blum, Meyer, Myshak and Mehrhoff, comply with the said regulation.

(g) As a proximate cause of Miller's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40, et seq., the plaintiff has suffered severe emotional and physical distress through and beyond the date of the said Merit System Protection Board Order.

(h) As a proximate cause of Miller's actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40, et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through and beyond the date of the Merit System Protection Board Order.

(i) As a proximate cause of Miller's actions, plaintiff's ability to return to the Boise ES Office free of

management interference is absent. Further, plaintiff's ability to secure or maintain employment in the government or the private sector in his profession is absent.

VIII

SEVENTH CAUSE OF ACTION

1. Plaintiff realleges the allegations of fact as found in his First, Second, Third, Fourth, Five and Sixth Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Ralph Pisapia, hereinafter "Pisapia," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) As of November 29, 1982, or shortly thereafter, Pisapia knew or should have known that the plaintiff did not have the background necessary to perform the work assigned to him in the Laguna Niguel, California-ES Field Office.

(b) On or about December 7, 1982, and for the first time, Pisapia did personally inquire of the plaintiff as to what his professional background was, including training, projects, etc. The plaintiff's response then estab-

lished without question the absence of such background to perform work in the coastal and marine projects generally undertaken at the Laguna Niguel Office.

(c) The plaintiff was given two basic projects by Pisapia. The first was to assist in a project known as the Santa Marguerita Project. The said project was already well staffed and plaintiff's assignment there was unnecessary and duplicative. The second project regarded the Hansen Dam Project. Pisapia knew or should have known at that time that the project originated with the Corps of Engineers, that the said Corps had identified that "no scope of work" was presently to be performed on the project, and that the project was not funded during the period October 1, 1982, through September 30, 1983.

(d) Pisapia refused to provide the plaintiff with an office key, or a telephone with which to work. Plaintiff was further refused authority to personally inspect the only assigned project site, i.e. Santa Marguerita Project. Thus, all of plaintiff's work had to be done in an office without the ability for telephone inquiry to other agencies regarding his work. Within approximately two weeks prior to plaintiff's arrival at Laguna Niguel, California, ES Office, Pisapia held a meeting with various staff members. Therein he specifically advised that the plaintiff was not to be associated with professionally and if personnel did, it would affect their careers. Further, he then specifically advised that the plaintiff was not to be given a key to the building, access to an automobile and no telephone.

(e) Pisapia knew that the plaintiff was being reassigned temporarily to Laguna Niguel, California by defendant, Blum, in response to conflict of interest charges being brought against the plaintiff. Pisapia could have refused the reassignment but did not.

(f) Pisapia insisted that plaintiff comply with Blum's directive to return to Boise between the close of business March 14, 1983, and the opening of business March 15, 1983, in awareness that the same was against regulations of the Department regarding safety and well-being of the employee. In response to the plaintiff's protestations regarding impossibility to comply with the directive as stated, Pisapia indicated that plaintiff could go AWOL and leave early. When plaintiff indicated that to do so would then allow Pisapia to file an adverse action on the plaintiff, Pisapia concurred.

(g) Pisapia, directly or indirectly, hindered and otherwise sought to obstruct a claim by the plaintiff for reimbursement of the expenses that related to the temporary assignment in Laguna Niguel. The claim was in the amount of $447.67. Following inquiry by U.S. Senator Steve Symms on or about August 3, 1984, the Assistant Director for the Service, Mr. Edward Davis, determined that in fact the reimbursement should be allowed and increased by an additional $96.02. Such repayment occurred in late August, 1984, more than a year following the original submission for claim.

(h) Pisapia, acting in concert with Blum, did injure plaintiff's reputation and placed the plaintiff in an "untouchable" status with his co-employees.

(i) As a proximate cause of Pisapia's actions, the plaintiff has suffered severe emotional and physical distress through and beyond the date of the said Merit System Board Protection Board Order.

(j) As a proximate cause of Pisapia's actions, the plaintiff has suffered a stigma regarding his professional reputation and credibility through and beyond the date of the said Merit System Board Protection Order which impairs his ability to maintain employment within the Service or obtain employment outside the Service.

IX

EIGHTH CAUSE OF ACTION

1. Plaintiff realleges the allegations of fact as found in his First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action as if herein set out in full.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as declared in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, John Wolflin, hereinafter "Wolflin," has intentionally, with callous and reckless disregard, and/or with deliberate indifference to the rights of the plaintiff acted to injure his good name, reputation, and integrity and thereby has stigmatized the plaintiff in a manner which effectively forecloses his present or future employment opportunities. The overt acts committed by the defendant include but were not limited to:

(a) After plaintiff was reinstated, and at the direction, express or implied, of defendants, Myshak, Meyer

and/or Blum, sought to force the plaintiff into a voluntary resignation.

(b) Acknowledging the same, Wolflin told the plaintiff "I know what they're trying to do to you, but I can't do anything to stop it."

(c) Wolflin's actions against the plaintiff were common knowledge to plaintiff's co-employees and resulted in the plaintiff becoming an "untouchable" in the Boise ES Office of the Service.

(d) As a direct and proximate cause of Wolflin's actions, plaintiff's ability to work in the Boise ES Office free of management interference and intimidation is absent.

(e) As a proximate cause of Wolflin's actions, the plaintiff has suffered severe emotional and physical distress.

(f) As a proximate cause of Wolflin's actions, the plaintiff has suffered a stigma regarding his professional reputation and credibility which impairs his ability to maintain employment within the Service or obtain employment outside the Service.

X

NINTH CAUSE OF ACTION

1. Plaintiff realleges the allegations as found in his First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action as if herein set out in full.

2. All of the named defendants have acted in concert and as agents of one another. They have conspired to eliminate the plaintiff as a fellow employee of the U.S.

Fish and Wildlife Service through formal adverse personnel proceedings.

3. When formal adverse personnsl proceedings failed, defendants, Blum, Myshak, Meyer, Miller and Wolflin, conspired to intimidate and either terminate or force the voluntarily resignation of plaintiff from his employment with the Service.

4. The co-conspirators, each and several, performed their individual acts alleged hereinabove in knowledge of and in furtherance of the said conspiracy.

5. As a proximate cause of the conspirators' actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered severe emotional and physical distress through and beyond the date of the said Merit System Protection Board Order.

6. As a proximate cause of the conspirators' actions, including but not limited to the failure to seek resolution of any alleged conflict of interest pursuant to 43 C.F.R. 20.735-40 et seq., the plaintiff has suffered a stigma regarding his professional reputation and credibility through and beyond the date of the said Merit System Protection Board Order.

7. As a proximate cause of the conspirators' actions, plaintiff's ability to return to the Boise ES Office free of management interference is absent. Further, plaintiff's ability to secure or maintain employment in the government or the private sector in his profession is absent.

XI

TENTH CAUSE OF ACTION

1. This action is brought to redress the deprivation of plaintiff's statutorily protected interest and freedom from the intentional infliction of emotional and physical distress.

2. Jurisdiction is conferred upon this Court by the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 2674 et seq.

3. Plaintiff realleges the allegations as found in his First through Ninth Causes of Action as if herein set out in full.

4. On June 18, 1984, the plaintiff timely filed a sufficient claim for damages pursuant to the FTCA with the Service.

5. His then attorney refused to pursue a FTCA procedure and on July 12, 1984, the plaintiff filed a Complaint in the Fourth Judicial District of the State of Idaho, in and for the County of Ada which included a cause of action for intentional infliction of emotional and physical distress.

6. Some time after plaintiff filed his Complaint in State Court, the Service denied his FTCA claim.

7. On August 29, 1984, the cause of action was then moved to Federal Court by the U.S. Attorney with an admission that all named defendants were acting within the scope of their employment. An Answer was filed by the United States Government on October 18, 1984.

8. The acts of the defendants individually and as co-conspirators as hereinabove alleged were within the scope of their employment as officers and employees of the Service. Those acts were made with callous and reckless disregard and/or with deliberate indifference to the rights of the plaintiff and were intended to cause plaintiff to suffer emotional and physical distress. Their acts were further intended to intimidate, harass and stigmatize the plaintiff. Plaintiff in fact has suffered severe emotional and physical distress as a result of the acts of the defendants.

PLAINTIFF HEREBY REQUESTS A JURY TRIAL

WHEREFORE, plaintiff, DAVID W. LEWIS, prays as follows:

1. A declaratory judgment that each of the named defendants violated plaintiff's Fifth Amendment rights.

2. A permanent injunction restraining defendants, Myshak, Meyer, Blum, Miller, Buechler, Wolflin and Pisapia, or anyone acting on their behalf from violating plaintiff's Fifth Amendment rights.

3. With regard to plaintiff's Causes of Action, First through Eighth, compensatory damages for each in the amount of $312,500.00.

4. With regard to plaintiff's Ninth Cause of Action, compensatory damages in the amount of $2,500,000.00.

5. With regard to plaintiff's Tenth Cause of Action, compensatory damages in the amount of $2,500,000.00.

6. Punitive damages in an amount as may be just and equitable.

7. Reasonable attorney's fees and all costs of these proceedings.

8. For such other and further relief as to this Court is just and equitable.

DATED this 26 day of August, 1985.

HYDE, WETHERELL, BRAY & HAFF
By /s/ Christopher D. Bray

STATE OF IDAHO)
) ss.
County of Ada)

DAVID W. LEWIS, being first duly sworn upon oath, deposes and says as follows:

That he is the Plaintiff in the above entitled action. That he has read the above and foregoing Amended Complaint, knows the contents thereof, and that the statements therein contained are true to the best of his knowledge and belief.

/s/ David W. Lewis

On this 26 day of August, 1985, before me, a Notary Public in and for said State, personally appeared DAVID W. LEWIS, known to me to be the person whose name is subscribed to the above and foregoing instrument, and who acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

/s/ Sharon Hammon
Notary Public for Idaho
Residing at Boise, Idaho

Christopher D. Bray
HYDE, WETHERELL, BRAY & HAFF
1004 West Fort Street
P. O. Box 139
Boise, Idaho 83701
Telephone: 343-1855

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DAVID W. LEWIS, Plaintiff, v. RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; JIM SISSON; LOYAL A. MEHRHOFF; DENNIS G. BUECHLER; JOHN WOLFLIN; and JOHN DOES I through X, Defendants.	)	Civil No. 84-1357 PLAINTIFF'S SECOND MOTION TO AMEND COMPLAINT

COMES NOW the Plaintiff above named by and through his attorney, Christopher D. Bray, who respectfully moves this Court for leave to amend his Complaint. His first Motion to Amend Complaint was filed on or about August 26, 1985. This second Motion to Amend Complaint is made pursuant to Rule 15(a) and (c) F.R.C.P. It incorporates the proposed Amended Complaint as verified by the Plaintiff and filed on or about August 26, 1985, with the following exceptions. The Defendant, Department of Interior, U.S. Fish and Wildlife Service, is

deleted and the Defendant, United States of America by and through the Department of Interior, U.S. Fish and Wildlife Service is inserted. To accomplish such amendment, enclosed are new pages 1, 3 and 34 to be inserted into the Amended Complaint as previously filed. Second, Plaintiff seeks to amend the prayer for relief on his First through Fifth and Seventh Causes of Action to the amount of $2,500,000.00. To accomplish such amendment, enclosed is new page 35 to be inserted into the Amended Complaint as previously filed.

This Motion is further based upon all matters of record before this Court including Plaintiff's Brief in support of this Motion as filed August 26, 1985, and Plaintiff's Reply to Defendants' Response to Motion to Amend Complaint.

DATED this 23 day of September, 1985.

HYDE, WETHERELL, BRAY & HAFF
By /s/ Christopher D. Bray

Christopher D. Bray
HYDE, WETHERELL, BRAY & HAFF
1004 West Fort Street
P.O. Box 139
Boise, Idaho 83701
Telephone: 343-1855

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DAVID W. LEWIS, Plaintiff, v. RICHARD MYSHAK; WILLIAM H. MEYER; JOSEPH R. BLUM; RUSSELL E. MILLER; LOYAL A. MEHRHOFF; DENNIS G. BUECHLER; JOHN WOLFLIN; RALPH PISAPIA; UNITED STATES OF AMERICA by and through the DEPARTMENT OF INTERIOR, U.S. FISH AND WILDLIFE SERVICE; and JOHN DOES I through X, Defendants.	)	Civil No. 84-1357 AMENDED COMPLAINT

COMES NOW, the above named plaintiff, and for cause of action against the several defendants, complains and alleges as follows:

PARTIES

I

1. The plaintiff, DAVID W. LEWIS, was at all times

relevant hereto employed by the Service and is now the Boise Field Supervisor of Boise Ecological Services Office, succeeding Mr. Buechler. He resides in Ada County, Idaho.

9. The defendant, Ralph Pisapia, was at all times relevant hereto employed by the Service as Field Supervisor of the Laguna Niguel, California-Ecological Services Office. His present residence is Albuquerque, New Mexico.

10. At all times mentioned and relevant hereto, the individual defendants were employees of the United States of America, by and through the Department of Interior, U.S. Fish and Wildlife Service.

11. The defendants, John Does I through X, are persons who are yet unknown to the plaintiff but reservation is hereby made for the addition of parties defendant and additional causes of action as determined by further discovery.

II

FIRST CAUSE OF ACTION

1. This action is brought to redress the deprivation of plaintiff's constitutionally protected liberty or property interest in reputation.

2. Jurisdiction is conferred upon this Court by the Fifth Amendment to the United States Constitution as

declared in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

3. The defendant, Dennis G. Buechler, hereinafter

Amended Complaint—3

4. In doing or omitting to do all the things herein alleged, the above named employees of defendant, United States of America, were acting within the scope of their respective employments, and with the permission and consent of the said defendant.

5. On June 18, 1984, the plaintiff timely filed a sufficient claim for damages pursuant to the FTCA with the Service.

6. His then attorney refused to pursue a FTCA procedure and on July 12, 1984, the plaintiff filed a Complaint in the Fourth Judicial District of the State of Idaho, in and for the County of Ada which included a cause of action for intentional infliction of emotional and physical distress.

7. Some time after plaintiff filed his Complaint in State Court, the Service denied his FTCA claim.

8. On August 29, 1984, the cause of action was then moved to Federal Court by the U.S. Attorney with an admission that all named defendant were acting within the scope of their employment. An Answer was filed by the United States Government on October 18, 1984.

9. The acts of the defendants individually and as co-conspirators as hereinabove alleged were within the scope of their employment as officers and employees of the Service. Those acts were made with callous and reckless disregard and/or with deliberate indifference to the rights

of the plaintiff and were intended to cause plaintiff to suffer emotional and physical distress. Their acts were further intended to intimidate, harass and stigmatize the plaintiff. Plaintiff in fact has suffered severe emotional and physical distress as a result of the acts of the defendants.

PLAINTIFF HEREBY REQUESTS A JURY TRIAL.

WHEREFORE, plaintiff DAVID W. LEWIS, prays as follows:

1. A declaratory judgment that each of the named defendants violated plaintiff's Fifth Amendment rights.

2. A permanent injunction restraining defendants, Myshak, Meyer, Blum, Miller, Buechler, Wolflin and Pisapia, or anyone acting on their behalf from violating plaintiff's Fifth Amendment rights.

3. With regard to plaintiff's Causes of Action, First through Fifth and Seventh, compensatory damages in the amount of $2,500,000.00.

4. With regard to plaintiff's Causes of Action, Sixth and Eighth, compensatory damages for each in the amount of $312,500.00.

5. With regard to plaintiff's Ninth Cause of Action, compensatory damages in the amount of $2,500,000.00.

6. With regard to plaintiff's Tenth Cause of Action, compensatory damages in the amount of $2,500,000.00.

7. Punitive damages in an amount as may be just and equitable.

8. Reasonable attorney's fees and all costs of these proceedings.

9. For such other and further relief as to this Court is just and equitable.

DATED this 23rd day of September, 1985.

HYDE, WETHERELL, BRAY
& HAFF

By /s/ Christopher D. Bray
Christopher D. Bray

Amended Complaint—35

No. 87-76

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID W. LEWIS, PETITIONER

v.

RICHARD MYSHAK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-76

DAVID W. LEWIS, PETITIONER

v.

RICHARD MYSHAK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that he is entitled to supplement the comprehensive scheme of remedies provided tenured federal employees by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, with a *Bivens* action against his supervisors, sued in their individual capacities. His argument is foreclosed by this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and merits no further review.

1. Petitioner, a biologist with the Department of the Interior's Fish and Wildlife Service, was charged with a conflict of interest violation and terminated by his agency. He appealed his termination to the Merit Systems Protection Board (MSPB), which affirmed the finding of a violation but concluded that petitioner's supervisors had not followed Department of the Interior regulations dealing with the resolution of conflicts of interest. See 43 C.F.R. 20.735-40. Accordingly, the MSPB held that the maximum allowable penalty for petitioner's infraction was a thirty-day suspension. No suspension was ordered, however, and petitioner was reinstated to his former position. See Pet. App. 2. Petitioner chose not to appeal the

MSPB's ruling to the United States Court of Appeals for the Federal Circuit, as he was entitled to do under 5 U.S.C. 7703(b)(1).

Petitioner subsequently filed this suit in state court seeking damages from his supervisors under the authority of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner claimed that his supervisors, by failing to follow conflict-of-interest regulations, deprived him of both liberty and property without due process of law. The case was removed to federal district court, where the complaint was amended to include a Federal Tort Claims Act (FTCA) claim against the United States. Pet. App. 3.

2. The district court dismissed the complaint (Pet. App. 8-10), holding that the FTCA claim was untimely and that the *Bivens* suit was barred by this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983). The court of appeals, in an unreported per curiam opinion, affirmed (Pet. App. 1-5). The court noted that both *Bush* v. *Lucas*, *supra*, and the court of appeals' own decision in *Veit* v. *Heckler*, 746 F.2d 508 (1984), establish that federal courts have no power to create remedies outside the CSRA to remedy personnel actions taken against tenured federal employees (Pet. App. 3-4). The court of appeals also agreed that petitioner's FTCA claim was untimely (*id.* at 5). This petition, raising only the *Bivens* issue, followed.

3. In *Bush* v. *Lucas*, *supra*, the Court held that a federal employee could not bring a nonstatutory suit for damages against his superiors based on the allegation that his dismissal was the product of unconstitutional conduct. The Court explained (462 U.S. at 368): "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush* controls this case.

Petitioner does not attempt to distinguish *Bush*. Instead, he contends (Pet. 6) that there is a conflict between the Ninth Circuit's decision and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Carducci* v. *Regan*, 714 F.2d 171 (1983). *Carducci*, however, did not even involve the issue raised here, whether a court may create a *Bivens* remedy to augment the remedies of tenured employees under the CSRA. Rather, that case dealt with whether agency personnel actions, involving non-constitutional claims once reviewable under the APA, continued to be reviewable after enactment of the CSRA. The D.C. Circuit held that Congress, by its enactment of the CSRA, precluded review of minor personnel actions that, prior to the CSRA's passage, were reviewable under the APA. The court noted that if this were not the case, "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated" by permitting, for lesser personnel actions, "an access to the courts more immediate and direct than the statute provides with regard to major adverse actions." 714 F.2d at 174.

The court in *Carducci* did not address the availability of *Bivens* relief to federal employees who, like the petitioner, have comprehensive administrative and judicial remedies provided by statute.[1] As noted, that issue was settled by this Court in *Bush*, and the lower courts are unanimous in holding that tenured federal employees do not have a *Bivens* remedy available to them, but must challenge adverse personnel actions by the procedures afforded them under the CSRA. See, *e.g.*, *Harding* v. *United States*

[1] Contrary to petitioner's suggestion (Pet. 6), the court of appeals did not even purport to leave this question open. No *Bivens* claim for damages against plaintiff's supervisors, sued in their individual capacities, was in question. The court did, however, leave open the very different question whether the plaintiff was entitled to APA review of his constitutional claims against the agency (714 F.2d at 177).

Postal Service, 802 F.2d 766 (4th Cir. 1986); *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

[2] There is no conflict over the application of *Bush* to tenured federal employees such as petitioner, who have comprehensive remedies, including administrative and judicial review, under the CSRA. We note, however, that the United States has filed a petition for certiorari in *Cooper* v. *Kotarski*, No. 86-1813, where a circuit conflict has developed over the application of *Bush* to probationary employees, who have expressly limited remedies under the CSRA. In addition, this Court has granted certiorari to decide whether non-veteran personnel in the excepted service, who have no right of review under the CSRA, may obtain judicial review of adverse personnel actions under the Tucker Act, 28 U.S.C. 1491. *United States* v. *Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987). Neither of those issues is presented in this case. Petitioner had the full complement of remedies under the CSRA available to him, including both MSPB and judicial review.

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